UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Kyle Feldman, *on behalf of himself and all others similarly situated*, Plaintiff, vs. Star Tribune Media Company, LLC, Defendant.	COURT FILE NO. 22-CV-1731 (ECT/TNL) Monday, January 9, 2023 St. Paul, Minnesota 9:00 A.M.

HEARING ON

DEFENDANT'S MOTION TO DISMISS

BEFORE THE HONORABLE ERIC C. TOSTRUD
UNITED STATES DISTRICT JUDGE

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(9:00 a.m.)

P R O C E E D I N G S

IN OPEN COURT

THE COURT: Good morning, everyone. Please be seated.

This is Kyle Feldman versus Star Tribune, Civil File Number 22-1731. Let me invite counsel to note their appearances, starting with the plaintiff.

MR. COULSON: Good morning, Your Honor. Nick Coulson for the plaintiff.

THE COURT: Good morning.

And how about for the Star Tribune?

MR. JUSTMAN: Good morning, Your Honor. Jeff Justman from Faegre Drinker for Star Tribune. With me is my colleague Anderson Tuggle. We have Randy Lebedoff, who's the General Counsel at the Star Tribune, and Jim Bernard, who's the Senior Vice President of Digital at the Star Tribune.

THE COURT: Terrific. Good morning.

All right. Mr. Justman, it's your motion. Let's hear from you first. I have questions. I'll do my best to sort of ask them where they seem to fit into your argument.

Well, actually, let me just get right to it here because we don't have a lot of time. We've got another hearing at 10:00 and then another one at 11:00 after that,

so we've got sort of a full morning here.

How did the common law define a private fact for purposes of the publication of private facts tort?

MR. JUSTMAN: So, yeah. If we're talking about the publication of private facts tort, you need a publication or publicity. It needs to be something that is -- I think the phrase in the cases is like -- let me just jump into that.

It's not outrageous, but something that's like offensive to more than the average person, and those are the two factors that we focus on in this case that Plaintiff has not alleged and we don't think could be alleged in this case, because he concedes on page 11 of the reply brief -- and it's not in the complaint -- that no human ever viewed any information that he alleges was sent to Facebook. So there's no publication. There can be no publication of private facts.

THE COURT: How did it define "private" fact, "private"? What's a private fact? Like, I went out and bought groceries yesterday.

MR. JUSTMAN: Yeah. I guess -- I haven't looked at that specific issue and I don't think that's raised by the motion. In other words, we're not contending that Mr. Feldman made public his viewing history by going to the startribune.com. What we're saying is, if he's trying to

create a historical analogue by citing under ***TransUnion*** the tort of publication of private facts, he needs to allege publicity, and there is no publicity when literally no human on Earth has seen or read his --

THE COURT: I get that. So you're accepting, in other words, that the purchaser, I guess I should say, of video watching history is a private fact.

MR. JUSTMAN: Yeah. We haven't argued here today that the videos he watched on startribune.com are available to the public. I mean -- let me rephrase it in a slightly better way.

The videos he watched, literally, if you are a Star Tribune subscriber, you can go to the Star Tribune website and watch the videos, but we haven't argued here today that Mr. Feldman's having watched some unnamed video is itself something that's public, if that makes any sense.

THE COURT: I think so.

MR. JUSTMAN: What we're saying is -- and this is squarely analogous to the ***TransUnion*** case at footnote 6 -- is that you need publication to be at least similar in degree and kind to the common law analogue, and they're not alleging that. I don't think my friend will stand up here and say that they're alleging that something was publicized to Facebook, much less the world at large.

THE COURT: So "publication" means shared with

another.

MR. JUSTMAN: It's a little bit more nuanced than that, but --

THE COURT: Well, give me the nuance then.

MR. JUSTMAN: So it means shared with either the public at large or a large enough group so as to infer that it will be made public, so that's publicity, to be clear.

THE COURT: Could sharing with one person ever be publication under the common law tort?

MR. JUSTMAN: For purposes of the common law tort of publication of private facts, no. For purposes of the tort of defamation, which is not being raised here, when you share something with one person that can be publication, technically what we're talking about is publicity, which is different than publication. But for purposes of today's hearing, all that matters is that the information that Mr. Feldman claims was private was not shared with anyone, one person, five people, a hundred people.

THE COURT: No, I'm going to get to that, but let me -- so where do I go in the law for the source of this rule that publication under the old common law tort means publication to some sufficient critical mass of people?

MR. JUSTMAN: Yeah. So we cite cases in our motion to dismiss and one I think is called the ***Yath*** case. And I can pull up the specific citation in our brief, but --

THE COURT: I've got ***Hunstein*** and ***Sputz***.

MR. JUSTMAN: So ***Hunstein*** talks about -- ***Hunstein*** gives you the framework and footnote 6 specifically says you need to look at whether something is being read and processed by a human being rather than just merely processed by a database. That case obviously dealt with defamation, which I don't understand Mr. Feldman to claim is the analogous tort here. The only analogous tort that they raise in their opposition to the motion to dismiss -- and again, that's not even in the complaint, which we think is a defect on its own, but the opposition to the motion to dismiss raises one and that's disclosure of private facts, but that still needs publicity, which is sharing or dissemination of information with a broad group of people or the public. And you'd go to I believe it's the ***Yath*** case, ***Yath vs. Fairview Clinics***. That's 767 N.W.2d 34. We cite that in our brief.

THE COURT: Okay. So that seems like kind of -- and I had a question about that. That seems like kind of a detour. So the Supreme Court says that if I'm going to figure out whether there's Article III injury here, I look to the original common law as it exists I suppose at the time Article III is adopted, right? That's what I'm trying to do.

MR. JUSTMAN: Yeah. So I think what ***TransUnion***

says, you look to historical common law analogues under the English or American tradition. It doesn't say what time, but, you know, we haven't engaged in a debate amongst the parties here about whether it's okay to look at --

THE COURT: I think implicitly you are, because if you're citing Minnesota law today --

MR. JUSTMAN: Well, that's just one example --

THE COURT: Okay.

MR. JUSTMAN: -- right. So we've also cited the *Restatement* and I don't understand the parties to be in a disagreement about whether a hundred people versus five people is enough, or about how outrageous or highly offensive to the average person the disclosure needs to be. They're saying we don't need to do that. We're saying you do. And our view is if you agree with us that he needs to allege the elements of the historical analogue, the common law tort, they haven't done that. That's not in the complaint and it's not really even in the opposition papers.

THE COURT: Okay. So let's get to that other issue, then, which is the issue of whether it needs to be disclosed to a living, breathing person.

Facebook's got computers that are doing the stuff that people used to do. I don't pretend to understand it. That can't be enough. In other words -- and, look, I don't think any of this is in the complaint and they haven't asked

for leave to amend, so we're past that as far as I'm concerned.

But it seems to me that if the disclosure takes place to some machine that than does the work that human beings used to do and does something with it in a way that injures a person, hypothetically speaking, that could be enough. You disagree?

MR. JUSTMAN: I wouldn't disagree with you. If they had pleaded that, which I agree with Your Honor they haven't, and if they had alleged the connection between sharing of information with Facebook and humans looking at it, which they haven't, and then the next step of humans looking at it with some harm to him, which they haven't, I agree with you that would be enough.

THE COURT: Okay.

MR. JUSTMAN: Footnote 6 in ***TransUnion*** is in our view squarely controlling and says when it's just a mere processing of data and no human understands it or reads it, that's not enough.

THE COURT: Okay. All right. Mr. Justman, why don't you pick up where you were planning to argue here and I'll try to stay quiet for a little while.

MR. JUSTMAN: Yeah. I was going to jump in straight to the Article III injury, because obviously that goes to the Court's jurisdiction and we think that's the

most straightforward basis for dismissing. I've already talked with Your Honor much about that. You know, I'll just jump into sort of responding to what I understand the other arguments are on that.

One argument is other federal courts have found standing in VPPA cases. Our view is, number one, those cases predated ***TransUnion*** and can't be squared with its more specific element-by-element analysis.

And number two, ***TransUnion***, ***Spokeo***, and the Eighth Circuit's cases we cite in our brief say it's case by case and, you know, fact by fact. So the fact that other cases may have found Article III injury doesn't mean that there's a concrete harm in this case is our view. So I think, you know, that really addresses the main Article III concrete injury point.

I did want to also note there's a separate argument we have under the second prong of standing, which is causation and fairly traceable. My view is the Eighth Circuit's decision in ***St. Louis Heart Center*** is as close as you can get. Basically, that says: Look, if you're the plaintiff and you can prevent the type of injury, you have the means and you have the opportunity to prevent the injury and you don't do it, that cuts off the chain of causation such that it's not fairly traceable. That's ***St. Louis Heart Center*** we cite in our --

THE COURT: Right. So a couple things on this just so we're all on the same page. I haven't read that case. I've read everything, but I didn't read that case. I read some of the cases.

I think with respect to causation, I'll incorporate a plan for that if it's necessary in the order addressing everything else that you've raised here today. My inclination is not to have a separate hearing on that, but it is to send you to Magistrate Judge Leung and let you argue about whether discovery ought to be bifurcated and focused on those particular issues. But even if he says no to that, you still have the capacity to focus on what you need early on and obviously you're not barred from bringing a successive 12(b)(1) motion.

MR. JUSTMAN: Yeah. Our view is the Court can grant our motion today even if it doesn't address causation or fairly traceable. And even aside from that, the hearing issue, we just wanted the Court to know that we can try and make complex technical arguments about what Pixel does and what a cookie is, you know, clearer if the Court had wanted to have a hearing. We've submitted evidence. We think it's appropriate. They haven't submitted counter evidence, so our view is the Court can decide how it wants to handle that without needing to refer something to a magistrate judge or to have bifurcated discovery.

THE COURT: No, I appreciated the suggestion and I don't intend to refer the substantive issue to Judge Leung, just --

MR. JUSTMAN: Yeah. So then our view -- I'll just move to the merits, understanding time is short this morning.

Our view on the merits is there isn't in the complaint any allegation sufficiently specific to explain the connection. It's not about personally identifiable information. It's about the connection between Mr. Feldman's Facebook ID and the URLs that show the videos he allegedly watched. The ***Hulu*** case from 2015 in California makes this very clear. You can't just say the Star Tribune disclosed a Facebook ID. You can't just say the Star Tribune disclosed video URL information. You need to allege that they've disclosed them together at the same time in the same way such that a reasonable person would view them just like the Judge Bork video store clerk did.

THE COURT: Ordinary person. Who's an ordinary person?

MR. JUSTMAN: I think Your Honor is an ordinary person. I think I'm an ordinary person.

(Laughter)

THE COURT: So someone not necessarily learned in the technology.

MR. JUSTMAN: I don't think you need to be learned in the technology. I think if you are learned in the technology, that would be a factor to consider. I don't think that matters in this case because they haven't explained how the sort of complex screenshot that shows a whole bunch of cookies and other weird information can be viewed by anyone, whether it's ordinary or extraordinary, whether at Facebook or in the world at large.

The other thing I'll just note on this, Your Honor, the statute requires that the plaintiff identify specific video materials. That's the phrase, specific video materials. The complaint doesn't include one video that Mr. Feldman says he watched, not the specifics of one video. So in our view that's deficient for reasons similar to our Article III standing argument.

But normally the plaintiff says, "Hey, I watched this video." The only video that's specifically identified in the complaint is a video about NASA, and the allegations are very clearly -- I'm trying to think of the right word. They do not clearly identify Mr. Feldman as having watched that video. That's a defect that he could theoretically cure, but that's not something that has been specifically alleged in the complaint. So if you want to know what I'm referring to, Your Honor, it's --

THE COURT: No, I got it, paragraphs 23 to 26.

MR. JUSTMAN: Yeah. It just says this is what occurs when someone visits a website.

THE COURT: Yeah. I note that now. It's in the passive voice throughout.

MR. JUSTMAN: Yeah. There are allegations that he watched videos, but he needs to specify what videos they are to state a claim under the statute.

I'll probably have more thoughts and maybe comments following my colleague's presentation, but with that I'm happy to sit down or answer other questions Your Honor might have.

THE COURT: No, I think that'll do it. Thank you, Mr. Justman.

MR. JUSTMAN: Thank you.

THE COURT: Mr. Coulson? You probably gather the first question I'm going to ask you is how is Mr. Feldman injured.

MR. COULSON: So, Your Honor, our position is that the defendant's take on the injury-in-fact argument or analysis --

THE COURT: No. How is he injured?

MR. COULSON: Certain things are an injury, Your Honor, and this is treated really well in the ***Eichenberger*** case, but certain things are an injury simply by virtue of an intrusion into one's private space. This is something we

address in terms of the legislative history of the Act that ***Eichenberger*** touches on, but sometimes things are offensive just because of the intrusion. And so we can talk about all kinds of potential uses of that information and the ways that Facebook uses it to market back to you or to try to create an image of your interests, your political views, your proclivities, the things that they can sell to you, the things that they can try to market for your attention.

But the core injury here and what the court says, the Ninth Circuit says, in ***Eichenberger*** is that any violation of this statute is a concrete injury because of the invasion into that private space, and the legislative history gives all the reasons why that would be so offensive and why that is private information.

THE COURT: So it's not possible for someone, in your view, to violate the statute and not violate Article III, not run afoul of Article III. Every violation of the statute is sufficient to show injury under Article III. If that's your position, then I've got some other questions for you.

MR. COULSON: I'm trying to think of a hypothetical, Your Honor, that would sort of disprove that general rule and I'm not sure that I have one. I'm not sure that every single violation that's conceivable does, but certainly what the Ninth Circuit says in ***Eichenberger*** is

that if you have intruded into someone's space in this way, then that is a concrete injury *per se*.

The distinction between a substantive violation, which is what you have under VPPA, and a procedural violation, a mere procedural violation, which is what you have in these ***Mailing Vendor*** theory cases under the FDCPA, is a crucial distinction, and it's really well-treated in ***Eichenberger***. You know, it's a big difference -- we have Congress saying -- we have to remember that under both ***Spokeo*** and ***TransUnion***, the Supreme Court has told us that it is both history and the judgment of Congress that are relevant in determining --

THE COURT: Well, but Congress can sort of nudge at the boundaries of Article III, but it can't blow past them.

MR. COULSON: Certainly, Your Honor, and we're in complete agreement there.

And so one situation in which Congress could nudge at the boundaries of it is by taking something which would be -- the historical analogue would be, well, it's, you know, disclosure to another person and it's offensive. And here the defendant has made a lot of hay about the fact that there's no evidence that any human being ever actually saw that.

We think it's worse here. We think it's a lot

worse, that it's not, as the Court said necessarily, that computers taking on a job that used to be fulfilled by humans. This is not similar to Ted in a cubicle somewhere in San Francisco having access to information that happens to be sent over Facebook. This is information that's being disclosed to hyper-sophisticated artificial intelligence in order to create a portrait of someone and give Facebook information that most people would find to be extremely offensive.

I mean, this is -- the information that Facebook has about every single one of us and that they can use your viewing history to see: Do you look at more articles about Republican or Democratic candidates? What are your views on controversial social issues? Any of these other things that could be in the context of a news cite, very telling as to somebody's proclivities, interests, leanings --

THE COURT: All right. So here's where I'm looking for help.

You've described what might be an injury. Where do I go in the complaint, what paragraphs do I look at, to see where those injuries are actually injuries Mr. Feldman suffered?

MR. COULSON: It's inherent to the Facebook Pixel, Your Honor, and I gather that perhaps this requires the application of some reasonable inference from the complaint.

We are not suggesting that any specific use was made of Mr. Feldman's data because we don't have access to that. That's something we could not possibly know prior to discovery. But it's our position -- and we think it's a well-supported position -- that the mere intrusion into his private space in the absence of a disclosure that Congress felt necessary to impose on these things and in the absence of anything that would have fairly told him: Hey, this is what we're going to do with your data, the mere intrusion of that and provision of it to one of the largest corporate entities on the planet that's going to do all sorts of things with it, that alone constitutes an injury, and that's why we believe that these arguments are no longer being raised in these cases as it relates to standing.

In fact, I've got two cases where the defendant just invoked federal jurisdiction on these cases. It's just -- it's not an argument -- after the line of cases that followed ***Spokeo***, after the Michigan privacy protection case that did follow ***TransUnion***, the intrusion itself is offensive enough to create an injury regardless of what Facebook does with that information and regardless of what the defendant is able to do with that information as it relates to their relationship with Facebook.

THE COURT: So the use of the passive voice with respect to this NASA video was deliberate, and that's not

something that you're alleging Mr. Feldman watched necessarily.

MR. COULSON: That was intended to be illustrative, Your Honor, so that is not one of Mr. Feldman specifically.

And I would note that the statute does talk about the disclosure of specific video materials, meaning what I believe our burden to allege is that the defendant did disclose which specific video materials the plaintiff viewed. I don't believe as a threshold matter that we have to go through and list each and every video or even a subset of the videos that Mr. Feldman actually viewed. If the Court disagrees with that, we would request leave to amend, because I believe that's something that we can allege, but don't believe that that's material as a threshold matter here, because the statute just states we have to allege that the defendant is disclosing. It's not that the defendant is telling Facebook this person is watching some video on our site.

And that also goes, Your Honor, to the defendant's knowledge argument, because the entire purpose of this Meta or Facebook Pixel device is for Facebook to glean the information of which specific material is being accessed by which people. Meta has no interest in learning this video was viewed by some person at the same time that it learns

John Doe viewed some video. Meta wants to know John Doe video XYZ. That's the data that's useful to them and that's what their purpose is in monetizing views of the website with this Facebook Pixel.

THE COURT: So this is knowledge on the merits you're talking about now.

MR. COULSON: It is, Your Honor --

THE COURT: Okay.

MR. COULSON: -- but it's just a closely-related concept.

THE COURT: Where do I go in the complaint to find an allegation that suggests that the Star Tribune knew that?

MR. COULSON: Your Honor, I believe that we do state knowingly -- when we talk about the simultaneous and joint disclosure, so at paragraphs 23, 30, 31, 49 -- and I believe there are a number of other places that we state "knowingly," but it's the entire purpose, Your Honor. Again, it's a reasonable inference area perhaps, but it's the entire purpose of a sophisticated web presence incorporating Meta Pixel on its website.

So when their web designers create their page, they have to actually implement code that inserts this cookie that opens this door to Facebook for their website viewers. And so they know what it does because there's a reason that they're putting it in the website. It's sort of

like having a lock on the door of your house. You have a lock on the door of your house because you know it looks the door. You put Meta Pixel in your website because you know it simultaneously discloses these pieces of information to Facebook, who they then can provide you with access to some of that data in a way that you can monetize either through remarketing to people or targeting them on your own site with specific things.

So those are the reasons that it's simply not a credible argument that the defendant wouldn't have known.

THE COURT: All right.

MR. COULSON: Your Honor, I would probably just move to the substantive portion, the merits portion of the argument, because we really do believe that the standing issue is closed on VPPA cases. That ship has sailed.

And I guess just to close the loop on the standing point, the statute that's at issue matters, the harm involved matters, and the type of information that is disclosed matters. And that's why in our brief we cite the ***In re Mailing Vendor*** theory cases that basically says: Come on. We have a hard time with the idea that there's a historical analogue for the disclosure of your failure to meet a modest obligation. This is not that. This is something where Congress can provide that nudge, where Congress can say, look, we do live in a different society

than we lived during the adoption of Article III in the Constitution and that technology provides opportunity for intrusions that are analogous, but not exactly the same at the time, and here's why we think this is offensive: It inhibits thought. It inhibits, you know, the development of thought. It inhibits all these things and people in general would find it to be offensive that these are things that are being functionally sold from one entity to another as it relates to them specifically and that's reflected in the judgment of Congress.

As it relates to the substantive elements of the VPPA, Your Honor, rarely if ever is there a situation in which such -- frankly, almost identical fact patterns have been scrutinized under the same legal theory so many times, so recently, and they've all come out the same way.

And I think the one most glaring thing that I want to address is the comparison to the ***In re Hulu*** case, because ***Hulu*** is different. ***Hulu Privacy*** relates to -- first of all, there are a number of things in that case that cut out our way, frankly, but ***Hulu*** was under a different set of factual circumstances where there were two separate data points being disclosed and there was no evidence that they were being disclosed together, simultaneously, to Facebook in a way that would allow it to make use of that information as the person viewed this video.

And that's why the ***Epoch Times*** case that we cited in our notice of supplemental authority, but also the ***Lebakken*** case and the ***Louth*** case, which was the NFL case, they cite ***Hulu*** and they still, just like every single other case on this issue to come out recently under the current configuration of the Meta Pixel, have found that no, this constitutes PII. When you disclose these things together, which is not a coincidence, it's done so that it's a single sort of data point that Meta can use, that constitutes PII.

So that's the key distinction with ***Hulu***. ***Hulu*** is an outdated case based on -- at least as it relates to the real world factual scenario, because that's not the way that it works anymore. That's not what this case and this recent line of cases alleged. And so it's the entire point of the current configuration of Pixel for them to be able to make specific determinations about who viewed what. And in our view, although obviously computers were not around at the adoption of Article III, it's much more offensive to have this sophisticated picture created of one's viewing habits and interests by artificial intelligence than it would be if one or three or five people in a back office somewhere had access to this information. And frankly, we're not alleging that, but that may well be the case. It's just -- it's not material to our position.

THE COURT: I do think it's sort of -- I don't

think -- as I sit here, I don't think it's either here or there, but you're spending a lot of time talking about modern technology and we're talking about a statute here that's directed to videotapes. Anyway.

MR. COULSON: The modern technology, Your Honor, obviously relates more to the historical analogue component of the injury-in-fact analysis, but it's that modern technology and the application of it and the way that this operates that makes this so offensive, and it underscores why this is PII, why this is something that's worth protecting and why it does not matter that no human being is necessarily viewing this information, because it's being used for, frankly, much more -- I won't say sinister, but a much more offensive purpose in our view.

THE COURT: All right. Thank you, Mr. Coulson.

MR. COULSON: Thank you, Your Honor.

THE COURT: Mr. Justman?

MR. JUSTMAN: Thanks, Your Honor. I have a few points I'd like to address and I'll take them in sort of a two-part approach, first addressing the Article III injury.

The Court asked about, you know, what are authorities that talk about publication of private facts. We've cited these in our briefs and in the supplemental authorities.

But just to redirect Your Honor's attention,

Hunstein from the Eleventh Circuit, that's the *en banc* decision, and ***Shields*** from the Tenth Circuit, we cited that recently in our supplemental authority letter. Those both go through the exact same analysis that we think Your Honor would apply here to dismiss for lack of a concrete injury, because there's no publicity under the historical common law analogue.

A lot of what I heard my colleague just say is interesting and hypothetical, but it's not alleged in the complaint, so discussions about hyper-specific artificial intelligence, you know, use of information to glean what political candidate someone supported, that's not close to being alleged in the complaint. You can't infer that. He didn't cite any paragraphs from which you could reasonably infer that those are harms that you can glean from the complaint.

The argument as I understand it is essentially that because recent decisions haven't addressed Article III, that's for all times decided, the ship has sailed I think is what was said, that's not what ***TransUnion*** says. ***TransUnion*** says you look at it case by case. We cite other decisions that look at it on a case-by-case analysis.

And as Your Honor knows, it's not just a unique FDCPA-type theory, right? ***Spokeo*** and ***TransUnion*** were Fair Credit Reporting Act cases. ***Hunstein*** was a Fair Debt

Collection Practices Act case. We've cited cases from the Cable Act, from the TCPA, and other federal statutes, so obviously Article III applies equally across all of those.

There was a discussion about whether it's necessary to allege what specific videos were alleged, and our view is that is necessary both to state a claim under the statute, but also to inform the Court of whether disclosure of that would be highly offensive under the historical common law analysis, right? If you go to the Star Tribune's website and read an article about a matter of current events, that's not necessarily going to be highly offensive to the average or ordinary person, so that's why in our view an allegation of the specific video is necessary both for the merits, but also for Article III purposes.

Your Honor's brow is furrowed.

THE COURT: Oh, I'm going back to the private fact question that I asked earlier.

MR. JUSTMAN: Okay.

THE COURT: And the reason I asked that question -- and I probably didn't make it very clear -- is just that, which is your position is that whether a plaintiff in a case like this has plausibly alleged Article III injury depends in part on the content.

MR. JUSTMAN: Yes. Because under the historical analogues that he says in the motion to dismiss papers --

now, again, those aren't in the complaint -- one of the elements is that it's highly offensive to an ordinary person to have that information publicized, and we can't know if it would be highly offensive to the ordinary person that Mr. Feldman's video viewing history would be highly offensive if it were publicized because we don't know what those videos are. Going to a mainstream news outlet's website isn't in itself highly offensive to the ordinary person in our view.

And just to conclude, you know, we don't think that any of the distinctions that our colleague drew about ***Hulu*** are material. That case also involved the same type of cookie, what's called the c_user cookie, you know, a digital piece of data, and the court in California said you need to know what the piece of data is, you need to know what the videos are, and it needs to connect them together. And for the knowledge element of the statute, the defendant needs to know that they were connected and you need to have plausible allegations showing knowledge of the connection, and that's not alleged here. And in our view that's why some of the cases that have been cited recently, they don't really address that specifically. Most of those cases talk about whether a defendant is a videotape service provider, or whether the plaintiff is a consumer, or whether a Facebook ID is personally identifiable information. We're not

arguing any of those three things here. We're talking about the connection piece of it.

So if Your Honor doesn't have any further questions, I'll --

THE COURT: I have one question, but it's just out of curiosity. I really don't think it affects the -- it doesn't affect the decision here in any way, but we've got this statute out here on videotapes which I spent a fair amount of time with over the weekend. We don't have a similar statute out there on books, I assume --

MR. JUSTMAN: Correct.

THE COURT: -- or newspapers.

MR. JUSTMAN: Correct.

THE COURT: Or political tracts.

MR. JUSTMAN: I think that's right. So what's interesting, I think --

THE COURT: It's weird.

MR. JUSTMAN: Well, it is weird and you'd --

THE COURT: Odd.

MR. JUSTMAN: -- have to dig deeper into the legislative history to understand why Congress -- and some of the legislative history materials that are cited in the motion to dismiss opposition. They reference books and things, and then obviously books are not in the final statute, so something changed.

I will point out I think there are some state statutes that go different in scope, so I think the Michigan statute might relate to books, for example. That's just as a matter of historical curiosity. I don't know why that is.

But the point there, I think, just to bring it home here, is you need to look at things in context and what Congress was trying to prevent, and they're trying to prevent someone from publicly disclosing your video viewing history just like Judge Bork was and sending a cookie from a website to Facebook where Facebook is not looking at it, no human is ever seeing it --

THE COURT: Without any allegation, right?

MR. JUSTMAN: Right. There's no allegation. And frankly, I don't think there's any allegation in any of the other cases either, right? This isn't something that's sort of unique to how the complaint here was pleaded. I don't think this is something that's alleged in any of these Facebook Pixel cases. As far as I can tell, the plaintiffs in all of these cases are saying just the mere disclosure -- and then they're citing some of the pre-***TransUnion*** cases that are cited today -- automatically creates an injury in every case, and our view is that can't be right.

THE COURT: All right. Thank you, Mr. Justman.

MR. JUSTMAN: Okay. Thank you.

THE COURT: Mr. Coulson, I'll give you the last

word.

MR. COULSON: Thank you, Your Honor.

I most importantly just wanted to note -- because I think Counsel mistakenly represented our position -- which is not just that because many of these recent cases have not dealt with standing, that that's why the ship has sailed. The ship has sailed because following ***Spokeo***, several courts, including courts of appeal, addressed the standing issue in a way that accounts for every salient concern raised in ***TransUnion***. The defendant can point to no language in ***TransUnion*** that would materially change that analysis, that would undermine any of those opinions.

And then, of course, we do have the case dealing with the Michigan statute that is following ***TransUnion***, and it's the same analysis, Your Honor. There is nothing that's materially different that changed that analysis that would render those cases any less instructive. You know, provided they're not from the Eighth Circuit, but they're certainly persuasive and instructive on this issue and there is no divergence of authority. It's unanimous.

I also wanted to note that the defendant's position about the specific video being disclosed and whether or not that's offensive, that would place Article III courts in a position of deciding as a threshold matter of standing whether or not particular pieces of information

either standing alone or in combination were offensive, just a matter of getting through the courthouse door. That can't possibly be what the analysis is here as it relates to a statute that has decided this type of information is inherently private such that any intrusion into that area is offensive.

THE COURT: I don't think -- that doesn't bother me so much. I don't think I need to decide it here, but it doesn't bother me, for example, to decide -- to think that I have to look to determine whether I've got a case or controversy, whether the disclosure was about a book or a video, something that sort of gets at First Amendment -- the exercise of constitutional rights versus disclosure of -- I don't know, what running shoes, what brand of running shoes you purchased.

MR. COULSON: Your Honor, it's --

THE COURT: I mean, there are some easy ones there and I'm not bothered by that. I concede they're being close cases, but this isn't -- I don't know that we're talking about a close case in the abstract. I think we're talking about a closer case as pleaded.

MR. COULSON: Your Honor, just accepting that that is the test would create not just close cases, but a muddled and inconsistent line of who has access to federal courts and who does not. Would it be offensive if someone had a

non-mainstream political view versus a mainstream political view? Would it be offensive if someone was interested in products that might reveal something about themselves? I mean, the number of permutations of what may or may not be offensive there I think is an analysis that the courts are not required to conduct given that Congress has sort of codified and recognized the societal concern that this is inherently private information.

THE COURT: Well, I'll grant you that here. I was going to take you up on your offer and ask you to define private then.

MR. COULSON: Your Honor, I think privacy relates to a person's expectation -- the reasonable expectation of privacy just like in all the constitutional cases that arise in the criminal context. And Congress's judgment to codify the expectation of privacy in the VPPA is a reflection of, as is stated in the legislative history, that people expect their private viewing histories to be and to remain private. It's no one's business what's -- sitting in one's own home or one's own office -- what video content one consumes. Certainly I think there are good policy arguments for extending it, but those are policy arguments for Congress to other mediums.

And indeed in Michigan, for example, what publications one subscribes to is a matter that's protected

by statute, the same as the ***Sterk*** case that occurred in Michigan under Michigan's version of this Act following ***TransUnion***, but here we're dealing with just this viewing history. It may well be that there are injuries to privacy as it relates to the consumption of materials and information that would give rise to Article III standing, but just simply don't because Congress for whatever reasons in its judgment decided not to enact a statute that covers those things.

So I have nothing further unless the Court has additional questions.

THE COURT: I don't think so, Mr. Coulson. Thank you.

MR. COULSON: Thank you, Your Honor.

THE COURT: All right. Well, I appreciate the briefing and the argument here today. It's an interesting question.

I wish -- just as an aside that's neither here nor there, but I wish when I was teaching federal jurisdiction at the University of Minnesota I knew about this statute, because I think one could probably draft an interesting test question from it. Anyway.

But as I say, I appreciate the briefing and the argument today. It's been very helpful in understanding the issue. The matter is under advisement. We'll get a

decision out as quickly as we can. And as I say, if circumstances warrant, we'll also in that order address how the causation issue should be handled going forward.

Thank you, everyone. We're adjourned.

(Proceedings concluded at 9:46 a.m.)

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C E R T I F I C A T E

I, **TIMOTHY J. WILLETTE**, Official Court Reporter for the United States District Court, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes, taken in the aforementioned matter, to the best of my skill and ability.

/s/ Timothy J. Willette

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